Southwestern Electric Company *and* International Brotherhood of Electrical Workers, Local Union No. 570, AFL–CIO. Cases 28–CA–15258 and 28–CA–15899

April 14, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND LIEBMAN

Upon a charge filed by the Union in Case 28–CA–15258 on June 19, 1998, and a charge filed by the Union in Case 28–CA–15899 on June 29, 1999, the General Counsel of the National Labor Relations Board issued a consolidated complaint (the complaint) on September 30, 1999, against Southwestern Electric Company, the Respondent, alleging that it has violated Section 8(a)(1) and (5) of the National Labor Relations Act. Subsequently, on October 13, 1999, the Respondent filed an answer to the complaint. On March 20, 2000, however, the Respondent withdrew its answer.

On March 23, 2000, the General Counsel filed a Motion for Summary Judgment with the Board. On March 24, 2000, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

Sections 102.20 and 102.21 of the Board's Rules and Regulations provide that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively notes that unless an answer is filed within 14 days of service, all the allegations in the complaint will be considered admitted. Further, the undisputed allegations in the Motion for Summary Judgment disclose that the Respondent, on March 20, 2000, withdrew its answer to the complaint. Such a withdrawal has the same effect as a failure to file an answer, i.e., the allegations in the complaint must be considered to be admitted to be true.[1]

Accordingly, based on the withdrawal of the Respondent's answer to the complaint, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

[1] See *Maislin Transport*, 274 NLRB 529 (1985).

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, an Arizona corporation with an office and principal place of business in Wilcox, Arizona, has been engaged in the building and construction industry as an electrical contractor doing commercial and residential electrical work.

During the 12-month period ending June 19, 1998, the Respondent, in the course and conduct of its business operations described above, purchased and received at its Wilcox, Arizona facility and jobsites within the State of Arizona, goods and materials valued in excess of $50,000 from other enterprises located in the State of Arizona, including Brown Wholesale Electric Company, which other enterprises had received those goods and materials directly from points outside the State of Arizona. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, John A. Culver (Culver) has held the positions of part owner and vice president of the Respondent, and has been a supervisor of the Respondent within the meaning of Section 2(11) of the Act and an agent of the Respondent, acting on its behalf, within the meaning of Section 2(13) of the Act.

At all material times, Bernie, whose last name is not presently known to the General Counsel, but is known to the Respondent, has held the position of representative of Knight Electric Company. Bernie and Knight Electric Company have been agents of the Respondent, acting on its behalf, within the meaning of Section 2(13) of the Act.

The employees of the Respondent, referred to in and covered by the collective-bargaining agreement described below, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

Saguaro Chapter, National Electrical Contractors Association (NECA) has been an organization composed of employers engaged in the construction industry and exists for the purpose, among other things, of representing its employer-members in negotiating with the Union and administering collective-bargaining agreements.

On about April 1, 1994, the Union entered into a collective-bargaining agreement with NECA (the Inside Agreement) which, by its terms, was effective from April 1, 1994 to March 31, 1997, and which by agreement between the Union and NECA was extended through June 30, 1997.

On about October 1, 1996, the Respondent, by Culver, executed a Letter of Assent-A, thereby authorizing NECA to act as its collective-bargaining representative for all matters contained in the current or any subsequent

approved labor agreement with the Union, and whereby the Respondent agreed to be bound by the Inside Agreement and to such future agreements unless timely notice was given.

The Respondent, an employer engaged in the building and construction industry, granted recognition to the Union as the exclusive collective-bargaining representative of the unit without regard to whether the Union's majority status had ever been established under the provisions of Section 9(a) of the Act, such recognition being established by the Inside Agreement pursuant to Section 8(f) of the Act.

The Inside Agreement, in the absence of timely notice of termination by the Respondent, automatically bound the Respondent to the successor agreement negotiated between the Union and NECA (the Agreement) which, by its terms, is effective from June 30, 1997 to March 31, 2000.

At all material times, the Union has been the limited exclusive representative of the unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

On about May 13, 1997, the Respondent withdrew recognition of the Union as the exclusive collective-bargaining representative of the unit.

On about a date in June 1997, which date is not presently more specifically known to the General Counsel, but which date is within the Respondent's knowledge, the Respondent entered into a verbal agreement with the Union in which it was agreed that the Union would not enforce the terms of the Agreement if the Respondent's owner only employed himself and his family to perform unit work, but that the Union would enforce, and the Respondent would abide by, the Agreement if other individuals were hired to perform unit work.

On about June 5, 1998, the Union sent the Respondent a letter advising it that on about April 19, 1998, the Union became aware that the Respondent was advertising for employees to perform unit work and demanded that the Respondent abide by the terms of the Agreement.

On about September 1, 1998, the Respondent entered into an agrement with the Union whereby the Union agreed not to enforce the Agreement on work performed by the Respondent before September 1, 1998, but conditioned upon the Respondent's compliance with the terms of the Agreement subsequent to that date.

On various dates during the period from January through March 1999, the Union became aware that during the period subsequent to September 1, 1998, the Respondent had changed the terms and conditions of the unit by continuing to fail and refuse to abide by the terms of the Agreement, including, without limitation, failing and refusing to utilize the Union's hiring hall for employee referrals for employment in the unit, and failing to apply wages, hours, and other terms and conditions of employment set forth in the Agreement to unit employees of the Respondent.

On about May 21, 1999, after advising the Respondent that it was aware that the Respondent was not complying with the Agreement, the Union entered into a verbal agreement with the Respondent whereby the Union agreed not to enforce the Agreement on work performed by the Respondent prior to May 21, 1999, contingent upon the Respondent's compliance with the terms of the Agreement on all work performed subsequent to that date.

On about May 24, 1999, the Respondent, by letter to the Union, evidenced its intention not to comply with or abide by the terms of the Agreement, including its intention not to abide by the terms of the Agreement on all work performed by the Respondent.

Since on about December 19, 1997, the Respondent has repudiated, failed and refused to abide by, and changed the terms and conditions of the unit set forth in the Inside Agreement and the Agreement, by, including, without limitation, failing and refusing to utilize the Union's hiring hall for employee referrals for employment in the unit, and changing the wages, rates of pay, medical benefits, retirement benefits, vacation pay, training, overtime compensation, other benefits, and other terms and conditions of employment set forth in the Inside Agrement and the Agreement.

Since about December 29, 1998, the Respondent has sought to avoid the hiring hall provisions of the Agreement by advertising for employees to perform unit work through agents such as Bernie and Knight Electric Company.

The subjects set forth above relate to rates of pay, wages, hours of employment, and other terms and conditions of employment of the unit and are mandatory subjects of collective bargaining.

The Respondent engaged in the acts and conduct described above unilaterally, without prior notice to the Union and without having afforded the Union an opportunity to bargain with the Respondent with respect to these acts and this conduct, and their effects.

On a date in March 1999, which date is not presently more specifically known to the General Counsel, but which date is within the Respondent's knowledge, the Respondent, by Bernie, interrogated applicant-employees for employment about their Union sympathies.

CONCLUSIONS OF LAW

By withdrawing recognition from the Union and by repudiating, failing and refusing to abide by, and changing the terms and conditions of employment set forth in, the Inside Agreement and the Agreement, the Respondent has failed and refused to bargain collectively with the Union as the limited exclusive collective-bargaining representative of the unit, and thereby has engaged in unfair labor practices within the meaning of Section

8(a)(5) and (1) and Section 2(6) and (7) of the Act. By interrogating applicant-employees about their union sympathies, the Respondent has interfered with, restrained, or coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order the Respondent to abide by the June 30, 1997—March 31, 2000 collective-bargaining agreement negotiated between NECA and the Union, and to make whole the unit employees for any loss of wages or benefits they may have suffered as a result of the Respondent's failure to comply with the agreement since December 19, 1997, in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 52 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). In addition, we shall order the Respondent to make all contractually required contributions to the various fringe benefit funds that it has failed to make since December 19, 1997, including any additional amounts due the funds on behalf of the unit employees in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn.7 (1979). Further, the Respondent shall reimburse unit employees for any expenses resulting from its failure to make the required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn.2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, supra, with interest as prescribed in *New Horizons for the Retarded*, supra.[2]

Finally, in order to remedy the Respondent's unlawful failure to comply with the contractual hiring hall provisions, we shall order an employment and backpay remedy for those applicants who would have been referred to the Respondent were it not for the Respondent's failure to abide by the 1997-2000 agreement. *J.E. Brown Electric*, 315 NLRB 620 (1994). The Respondent will have the opportunity to introduce evidence on reinstatement and backpay issues at the compliance stage. Id. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, supra.

[2] To the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the employer's delinquent contributions during the period of the delinquency, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund.

The General Counsel's motion requests that, as part of the remedy, the Board require the Respondent to mail a copy of the Notice to Employees to all of its employees employed from December 19, 1997, to the present, as well as to individuals whose names appeared on the Union's out-of-work list who would have been referred to employment with the Respondent but were not because of the Respondent's unlawful conduct. The General Counsel submits that this special mailing remedy is necessary in view of the nature of the industry and the employment conditions in which the unit employees work and in which the unfair labor practices in this case arise. We agree that, in the circumstances of this case, the requested mailing requirement would effectuate the purposes of the Act. Accordingly, we shall order the Respondent to mail the notices to the employees and applicants described above.

ORDER

The National Labor Relations Board orders that the Respondent, Southwestern Electric Company, Wilcox, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with International Brotherhood of Electrical Workers, Local Union No. 570, AFL–CIO, as the limited exclusive bargaining representative of the employees of the Respondent referred to in and covered by the June 30, 1997 to March 31, 2000 collective-bargaining agreement negotiated between the Union and the Saguaro Chapter, National Electrical Contractors Association.

(b) Failing and refusing to abide by the 1997–2000 collective-bargaining agreement between the Union and NECA, including failing to utilize the Union's hiring hall for employee referrals for employment in the unit and failing to apply the wages, hours, rates of pay, medical benefits, retirement benefits, vacation pay, training, overtime compensation, other benefits, and other terms and conditions of employment set forth in the agreement.

(c) Interrogating employee-applicants for employment about their union sympathies.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Comply with the terms and conditions of the 1997—2000 collective-bargaining agreement between the Union and NECA, and any automatic renewal or extension of it, including, but not limited to, the hiring hall provisions, the wage provisions, and the fringe benefit provisions for unit employees.

(b) Make whole the unit employees for any loss of earnings or benefits they may have suffered as a result of its unlawful failure to comply with the 1997—2000

agreement since December 19, 1997, as set forth in the remedy section of this decision.

(c) Make all contractually required contributions to the various fringe benefit funds that it has failed to make since December 19, 1997, and reimburse unit employees for any expenses ensuing from its failure to make the required contributions, as set forth in the remedy section of this decision.

(d) Offer immediate and full employment to those applicants who would have been referred to the Respondent by the Union were it not for the Respondent's unlawful conduct, and make them whole for any loss of earnings and other benefits suffered by reason of the Respondent's failure to hire them, with interest, in the manner set forth in the remedy section of this decision.

(e) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Wilcox, Arizona, copies of the attached notice marked "Appendix".[3] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 13, 1997.

(g) Mail a copy of the notice to all of its employees employed by the Respondent since December 19, 1997, and to individuals whose names appeared on the Union's out-of-work list who would have been referred to employment with the Respondent but for the Respondent's unlawful conduct.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated, Washington, D.C. April 14, 2000

John C. Truesdale, Chairman

Sarah M. Fox, Member

Wilma B. Liebman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail and refuse to recognize and bargain with International Brotherhood of Electrical Workers, Local Union No. 570, AFL–CIO, as the limited exclusive bargaining representative of our employees referred to in and covered by the June 30, 1997 to March 31, 2000 collective-bargaining agreement negotiated between the Union and the Saguaro Chapter, National Electrical Contractors Association.

WE WILL NOT fail and refuse to abide by the 1997—2000 collective-bargaining agreement between the Union and NECA, including failing to utilize the Union's hiring hall for employee referrals for employment in the unit and failing to apply the wages, hours, rates of pay, medical benefits, retirement benefits, vacation pay, training, overtime compensation, other benefits, and other terms and conditions of employment set forth in the agreement.

WE WILL NOT interrogate employee-applicants for employment about their union sympathies.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL comply with the terms and conditions of the 1997—2000 collective-bargaining agreement between the Union and NECA, and any automatic renewal or extension of it, including, but not limited to, the hiring hall provisions, the wage provisions, and the fringe benefit provisions for unit employees.

WE WILL make whole the unit employees for any loss of earnings or benefits they may have suffered as a result of our unlawful failure to comply with the 1997—2000 collective-bargaining agreement since December 19, 1997, with interest.

WE WILL make all contractually required contributions to the various fringe benefit funds that we have failed to make since December 19, 1997, and reimburse unit employees for any expenses ensuing from our failure to make the required contributions, with interest.

WE WILL offer immediate and full employment to those applicants who would have been referred for employment to us by the Union were it not for our unlawful conduct, and WE WILL make them whole for any loss of earnings and other benefits suffered by reason of our failure to hire them, with interest.

SOUTHWESTERN ELECTRIC COMPANY